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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

REAVER BLAKE, et al,

Petitioner

VERSUS

PHIL PETERS, et al,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

1. Is §26-2709 Georgia Code facially violative of the Fifth and Fourteenth Amendments' due process clause where it simply declares - - without providing for any process, substantive or procedural, pre - or post - seizure - - that "any funds . . . used for purposes of gambling in any gambling place ***shall vest*** in the County and shall be paid into the County Treasury as County funds (emphasis added) ?"

2. Is §26-2709 Georgia Code, as applied, violative of the Fifth and Fourteenth Amendments' due process clause where, almost six (6) years after the confiscation of Petitioners' money by the state police, it permits, without any pre - or post - seizure hearing, the state police to keep it, even though all criminal charges

arising out of the initial confrontation have long since been nolprossed?

3. In a Section 1983 action brought against state police officials to compel return of money unlawfully seized, are the aggrieved plaintiffs entitled to a pre-trial hearing to determine the Constitutionality of the search and seizure, where the defendants rely on and vicariously assert the State's forfeiture statute as their authority for the taking and retention of the money ?

4. May evidence seized during a flagrantly unconstitutional search be offered to prove a good-faith defense in a Section 1983 action ?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Reaver Blake, Mary A. DeLaughter, Frederick Lee Bell, Arthur McConnehead, Jr., Eddie B. Tucker, Carlton Wyche, P. J. Burns, Robert E. Davis, Samuel Thomas, Ben Wilson, James Lee, Marie Walker, Sammy Branch, E. S. Johnson, Sr., Mamie Lou Larkin and George Waters, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The judgment of the trial court was affirmed, without opinion, with a direction that it not be published. (App. A, *infra*, la).

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1981. (The fact that it ordered its judgment, without opinion, not to be published is no bar to this Court's review. See *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34.) The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), and is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

§1983 Title 42 U.S.C. provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or inmunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Georgia's forfeiture statute, §26-2709, Georgia Code, provides:

SEIZURE OF GAMBLING FUNDS OR OTHER THINGS OF VALUE.

Any funds or other things of value used for purposes of gambling and seized *in* any gambling place or found in or on any gambling device ***shall vest*** in the county and shall be paid into the county treasury as county funds (emphasis added).

STATEMENT OF THE FACTS

Beginning at about 11:00 p.m. on March 29th and continuing on till 3:00 a. m. March 30th, 1974, no less than 12 and, as the night wore on, as many as 32 agents of the Georgia Bureau of Investigation (GBI) conducted a lottery raid at the Lowndes County Country Club, a gathering place for black citizens in Valdosta, Georgia (T. 227, 154, 34).[1/]

The were armed with a warrant authorizing the search of one "L. B. McFarland, b/m, and any other person in the below described premises who could reasonably be involved in the concealment and destruction of evidence described in the warrant." (Defendants' x#40; T155, 184).

They were armed, as well, with M-1 carbines, side-arms, 3.57 magnums, shot-guns, and sledge-hammers (T100-7, 157, 244, 250).

After seizing the specific person named in the warrant, L. B. McFarland, they seized everyone else in the Club (T290).

Other agents, positioned outside the Club, proceeded indiscriminantly to seize anyone and everyone who drove up. There were no exceptions (T50-51, 256-58).

Everyone was searched, including their vehicles. In accordance with fixed GBI policy females got special treatment: they were strip-searched and examined anally and vaginally (T158, 180).

Phil Peters, presently the Director of the GBI, candidly admitted that, prior to the Petitioners' seizure, the GBI agents

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1/ T____ are references to the pagination of the trial transcript, Vol. 2, of the record on appeal.

had no reason to believe that any of them possessed gambling paraphernalia or were engaged in any criminal activity (T 188).

Who was arrested depended on whether "evidence of bolita or lottery (was found) on their person (sic), in their vehicles or under their control." If none, they were "released to go their way." Those with, were arrested, and whatever money they had was confiscated (T189-91). For example:

Reaver Blake	$ 257.43
Mary A. DeLaughter	196.66
Eddie B. Tucker	80.00
Carlton Wyche	33.00
Robert E. Davis	161.24
Sammy Branch	74.00
Mamie Lou Larkin	66.50
George Waters	31.17

Understandably, the State prosecutor made no effort to try the Petitioners on the charges arising out of the raid. When, four years later, as the cases were about to be nol-prossed, and the GBI, again in accordance with fixed policy, refused to return Petitioners' money, a Section 1983 action was instituted.

HOW, WHEN AND WHERE THE FEDERAL QUESTIONS WERE RAISED

From the very beginning 2/ and, apparently, in an unpersuasive brief to the court of appeals, the Petitioners attacked the illegality of the searches and seizures, the predatory taking and confiscatory refusal to return the money, the facial unconstitutionality of Georgia's forfeiture statute (§26-2709 Georgia Code), the unconstitutionality of the statute as applied, the failure to

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2/ A pre-trial motion to suppress coupled with a request for an evidentiary hearing was filed.

provide Petitioners with other than drumhead and pistol-at-the-head process, and the insufficiency, as a matter of law, of the defense interposed by the GBI agents.

The issues were clearly and fairly presented pre-trial, during trial and post-trial, were rejected by the trial court and, presumably, were considered and rejected by the court of appeals. They have been preserved for review.

The court denied the motion without a hearing.

REASONS FOR GRANTING THE WRIT

There is a direct and irreconcilable conflict between the decision below and decisions of this Court.

(1) The trial court, in the belief that *all* evidence, including evidence illegally seized, should be admitted in a Section 1983 action, failed to consider the forfeiture aspect of the case, and thereby came into direct and irreconcilable conflict with this Court's unanimous decision in ***One 1958 Plymouth Sedan v. Pennsylvania***, 380 U.S. 693.

(2) The decision below is in direct conflict with decisions of other circuits on the same matter of federal law, e. g., ***Berkowitz v. United States***, 340 F.2d 168 (1st Circuit, 1965), ***Pizzarello v. United States***, 408 F.2d 579 (2nd Circuit, 1969).

(3) For that matter, it is indirect conflict with its own decisions. See ***Lucia v. United States***, 474 F.2d 565 (5th Circuit, 1973); ***Jonas v. City of Atlanta***, 647 F.2d 580 (5th Circuit, 1981).

In ***Jonas***, a spotted-cow case, the defendant police officials vicariously asserted a Georgia forfeiture statute in a Section 1983 action as a defense to their failure to return a car which they had seized. Judge Frank M. Johnson, writing for the court held, citing ***One 1958 Plymouth Sedan v. Pennsylvania*** that, if the search was in violation of the Fourth Amendment, the plaintiff was "clearly . . . entitled to a directed verdict." ***Jonas***, at 585, n 6. The only appreciable difference between ***Jonas*** and this case is the result.

(4) The decision below is in direct conflict with decisions in Georgia and in other states. See ***Carson v. State***, 221 Ga. 299, 144 S. E. 2d 384 (1965) (evidence seized pursuant to deficient warrant must be excluded in a proceeding to abate public nuisance). In ***Blackmon, et al. v. Brotherhood Protective Order of Elks***, 232 Ga. 671, a unanimous court held that, "property whose

possession is legal but which has been . . . used in an illegal manner," may not be seized in an unconstitutional manner and "(e)vidence obtained by unlawful search and seizure may be suppressed," at 672.

See also *Carlisle v. State ex rel. Trammell*, 276 Ala. 436, 163 So. 2d 596 (1964) (suppression of illegally obtained evidence required in a proceeding to abate a gambling nuisance; decison rested in part on state statute); cf. *People v. Moore*, 69 Cal. 2d 674, 446 P. 2d 800, (1968); *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, 350 So. 2d 158 (La. 1977); *State v. Spoke Committee, Univ. Center*, 270 N. W. 2d 339 (N. D. 1978).

B.

This case involves important Due Process issues.

At trial and in the court of appeals the GBI agents, in defense of their refusal to return Petitioners' money six (6) years after seizure, constructed the following syllogism, not in jest:

(a) The money seized from Petitioners was gambling-related;

(b) under §26-2709 Ga. Code, gambling-related money is contraband per se:

(c) since gambling-related money is contraband per se, the Petitioners have no right to possess it.

Ergo, the GBI agents don't have to give it back.

This is precisely what the trial court charged (T359, 367-68).

The Georgia statute allows summary seizure and forfeiture without requiring notice to the parties in interest and without providing for an opportunity to be heard. It thus violates the

Due Process clause of the Fifth and Fourteenth Amendments to the Constitution.

This Court, in a variety of contexts, has held that deprivation of any property or entitlement, without notice and opportunity for a full hearing, is a violation of due process. ***Fuentes v. Shevin,*** 407 U.S. 67; ***Sniadach v. Family Finance Corp.,*** 295 U.S. 337; ***Bell v. Burson,*** 402 U.S. 535; ***Wisconsin v. Constantineau,*** 400 U.S. 433; ***Goldberg v. Kelly,*** 397 U.S. 254; ***North Georgia Furnishing, Inc. v. Di-Chem, Inc.,*** 419 U.S. 601.

The purpose of requiring that a person whose rights are to be affected be notified and be heard is not only to insure abstract fair-play to him, but to protect his use and possession of property from arbitrary encroachment - - "To minimize substantively unfair or mistaken deprivations of property." ***Fuentes v. Shevin,*** supra, at 81. Unlike the statute in ***Calero-Toledo v. Pearson Yacht Leasing Co.,*** 416 U.S. 663, the Georgia statute does not provide an opportunity to be heard at any time; it simply provides that the money "shall vest" in the county.

This is not due process. And it is now beyond cavil that defendants in a forfeiture proceeding are entitled to the same constitutional protection accorded parties in any proceeding that will or can deprive persons of their possessions. ***Boyd v. United States,*** 116 U. S. 616; ***One 1958 Plymouth Sedan v. Pennsylvania,*** 380 U.S. 693; cf. ***Calero-Toledo v. Pearson Yacht Leasing Co.,*** supra.

Moreover, the notion that no property rights can exist in derivative contraband, such as gambling-related money, is unwarranted:

"(T) here is some sort of interest which a possessor has in the thing he has under his physical control. That recognition cannot be legislatively denied in toto, that is, to the point of not allowing it to be weighed in the judicial scales. . . (I) f the interest

is impliedly or expressly called into existence by one of the guarantees of the Constitution, (the State) cannot preclude the holder of the interest from bringing it before a court of competent jurisdiction for evaluation and such vindication as it deserves on the merits. Somewhere in our constitutional regime', so long as it remains constitutional, the holder of the interest has a right to present for adjudiciation and appraisal by an independent court his claim that his interest has been cut off by the allegedly unconstitutional application of (a forfeiture statute). This is included in the very definition of constitutionalism, as we have understood that term in the U.S. since 1803 when Marshall, C. J., read his opinion in *Marbury v. Madison*. . . ." *Berkowitz v. United States*, 340 F.2d 168, 172-73 (1st Cir., 1965).

Accordingly, unless §26-2709 is read as though it does not deprive a bare possessor of the right to complain, in a timely fashion, in an appropriate forum, of an unconstitutional deprivation of his property, the statute is, in that particular application, violative of the Fourth, Fifth and Fourteenth Amendments to the Constitution. Cf. *United States v. Wilson*, 540 F. 2d 1100 (D. C. Cir., 1976); *United States v. Premises Known as 608 Taylor Ave.*, 584 F. 2d 1297 (3rd Cir., 1978).

This was not done here.

C.

The result below is shockingly wrong and presents substantial federal questions.

This case illustrates official oppression at its shabbiest. Hordes of GBI agents, emboldened by the fact that their victims were black and powerless, flagrantly trampled the Petitioners' Fourth, Fifth and Fourteenth Amendment rights. Having debased their victims, stripped them of their dignity figuratively and literally, and confiscated their meager funds, they told them

to go to jail. When that didn't stick - - when, four years later the cases were nol-prossed - - and the Petitioners asked for their money back, the agents told them to go to hell.

The issues here are not academic or episodic. Cf. ***Rice v. Sioux City Cemetery***, 349 U.S. 70, 74. No less a personage than the GBI Director, Phil Peters, has promised that dragnet seizures and strip-searches are, and will continue to be, GBI policy (T 188, 175-76). In spite of the fact that he and his colleagues have been haled into state and federal courts in cases involving similar melancholy issues - - predatory seizures of money and obdurate confiscatory retention - - they will not be deterred, unless and until someone stops them.

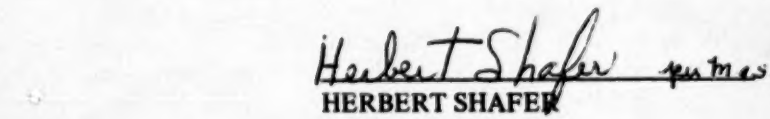
Worst of all, they use evidence so gathered to establish a good-faith defense to a Section 1983 action - - and they have been getting away with it. But see ***Jonas v. City of Atlanta***, 647 F. 2d 580, 588, n 12 (5th Cir., 1981). What is needed is an unequivocal pronouncement from this Court.

The court below should have directed a verdict for the Petitioners. The result below is so totally devoid of any legally cognizable evidentiary support as to render it unconstitutional under the Due Process clause. ***Thompson v. City of Louisville***, 362 U.S. 199; ***Garner v. Louisiana***, 368 U.S. 157, 163. The question here is not sufficiency of the evidence, but whether the result rests on any evidence at all - - whether those from whom money is so seized are powerless, six (6) years later, to get it back.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, HERBERT SHAFER, one of the Petitioners' attorneys, hereby certify that, in accordance with the Rules of the Supreme Court of United States, I have served three copies of the foregoing Petition upon the Appellees by depositing same in the United States mail, with sufficient postage, first class affixed thereto, and addressed to counsel for Appellees as follows:

HARRISON KOHLER, ESQ.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334

This is to further certify that all parties required to be served have been served.

This 13th day of July, 1981.

Herbert Shafer pro se

HERBERT SHAFER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-7290
Summary Calendar

REAVER BLAKE, MARY A. DeLAUGHTER,
FREDERICK LEE BELL, ET AL.,
Plaintiffs-Appellants

VERSUS

WILLIAM F. BEARDSLEY, ET AL.,
Defendants,

PHIL PETERS, GARY M. GARNER, ET AL.,
Defendant-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

(April 14, 1981)

Before RONEY, FRANK M. JOHNSON, JR., and HENDERSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966.